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18 DEMOCRATIC UNDERGROUND, LLC, and
19 Defendant DAVID ALLEN

16 **UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF NEVADA**

17 RIGHTHAVEN LLC, a Nevada limited liability company,)
18 Plaintiff,)

19 v.)

20 DEMOCRATIC UNDERGROUND, LLC, a District of)
21 Columbia limited-liability company; and DAVID ALLEN,)
22 an individual,)
23 Defendants.)

22 DEMOCRATIC UNDERGROUND, LLC, a District of)
23 Columbia limited-liability company,)
24 Counterclaimant,)

25 v.)

25 RIGHTHAVEN LLC, a Nevada limited liability company,)
26 and STEPHENS MEDIA LLC, a Nevada limited-liability)
27 company,)
28 Counterdefendants.)

Case No. 2:10-cv-01356-RLH
(RJJ)

**DECLARATION OF DAVID
ALLEN IN SUPPORT OF
DEFENDANTS'
CONSOLIDATED BRIEF
IN OPPOSITION TO
PLAINTIFF'S MOTION
FOR VOLUNTARY
DISMISSAL TO THE
EXTENT IT SEEKS TO
FORECLOSE AWARD OF
ATTORNEYS' FEES, AND
IN SUPPORT OF CROSS-
MOTION FOR SUMMARY
JUDGMENT**

1. I, David Allen, Defendant in the above-captioned action, am the principal of Democratic Underground, LLC. I have knowledge of the facts set forth herein, and would testify to the same if called upon to do so.

Democratic Underground

2. Democratic Underground maintains a website at www.democraticunderground.com (the "DU Website").
3. The DU Website is devoted to disseminating and discussing political news and progressive politics. Democratic Underground was founded on Inauguration Day, January 20, 2001, has become one of the premier left-wing websites on the Internet, hosting one of the Web's most active left-wing discussion boards. The purpose of the discussion board is to provide a forum for commentary and criticism about political issues.
4. In addition to myself, two other individuals work for Democratic Underground.
5. The DU Website consists primarily of user-generated content in the form of posting by readers in one of various discussion forums. The DU Website currently has more than 165,000 registered users who have, since its founding in 2001, posted more than 52 million posts to discussion threads addressing items of political and public interest.
6. The DU Website is supported, in part, by advertising revenue generated by display of advertising on the site.
7. Democratic Underground does not pre-screen posts made by contributors to the DU Website. Once a contributor writes a post, the post gets added through an automated process into a database on the server that hosts the DU Website. Democratic Underground hosts the posted material at the direction of its users in order to make that material available to other users upon those users' request. The materials in posts are of a type and kind selected by the poster and at a time initiated by the poster. Users who wish to post material may do so without

intervention of Democratic Underground.

8. When a reader seeks to access the web address of a particular post or forum on the DU Website (such as by clicking a link to that location on a browser), a request is automatically sent to the server. Its software will then automatically retrieve the contents of that post from the database and send them to the reader through the Internet. Users who wish to access a post may do so without intervention of Democratic Underground.
9. Neither I nor the other two employees reads every post made by users at the DU Website; in fact, such a task would be impossible. This is because approximately 14,000 new messages are posted to the DU Website everyday.
10. Democratic Underground does not pay posters or offer any financial incentive for adding content to the DU Website.
11. The DU Website maintains a copyright policy, a true and accurate copy of which is attached as Exhibit A and which can be accessed at www.democraticunderground.com/forums/rules_detailed.html.
12. Among other things, that policy advises users to post only short excerpts of stories and articles and to provide a link to the original article when posting about a news article. For example, on the forum for "Latest Breaking News" (where the post in question in this case was located), contributors must identify the source and provide a link to the news article they post about in the form they fill out to make the post.
13. Democratic Underground encourages readers to notify moderators if a post contains an entire article by clicking on an "Alert" link that is included on every post. The moderator will then edit the post to include only a short excerpt or delete the post.

The "Pampango" Post

14. On May 13, 2010, a Democratic Underground user with the username of

“Pampango” posted a portion of an article from the *Las Vegas Review-Journal* entitled “U.S. Senate Race: Tea Party Power Fuels Angle.” A copy of that post was attached as Exhibit 3 the Complaint in this case.

15. Pampango is neither an agent nor employee of mine or Democratic Underground’s.
16. In the 92 days it was posted and available at the DU Website, Pampango’s post garnered approximately 565 views, less than 6.5 per day, and less than one-thousandth of one-percent (0.001%) of the traffic to the DU Website.
17. On a typical day, the DU Website as a whole serves roughly 700,000 page views to 90,000 unique visitors.
18. During its time on the DU Website, Pampango’s post appeared on a page that, like the rest of the DU Website, contained advertising. However, none of that advertising was sold for display with or targeted by Democratic Underground to go with Pampango’s post. Rather, it was simply the same advertising system displayed generally throughout the DU Website.
19. On average, for a page like the one on which Pampango’s post appeared, the DU Website earns a CPM (cost per 1,000 page views) of about \$2.00. That means for every 1,000 times a DU Website page is viewed containing advertising, Democratic Underground makes about \$2.00.
20. During the 92 days Pampango’s post was available, the page on which Pampango’s post appeared had an average CPM of \$2.32, which means Democratic Underground would have received revenue connected with that page of no more than \$1.31 for the 565 views.

This Lawsuit

21. Before this lawsuit, I had never read Pampango’s post.
22. Before this lawsuit, neither the *Las Vegas Review-Journal* nor Righthaven ever

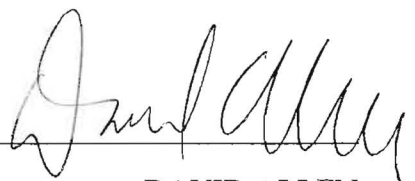
notified me or—to my knowledge—anyone else at Democratic Underground about Pampango’s post and as such I did not know they objected to the post or that they alleged it was infringing.

23. The first time I learned of this claim of infringement was when a reporter from the *Las Vegas Sun* called me, on August 11, 2010. At that point, I had not been served with the Complaint.
24. Pampagno’s post was removed as a precautionary measure from the DU Website on August 13, 2010.
25. In the normal course of business, posts are not removed from the DU Website unless a complaint is lodged against a post or a post violates DU Website rules. In this instance, Democratic Underground has preserved and intends to restore the Pampango post after the completion of this litigation, if the Court rules that it is a fair use.
26. Once I did learn of this lawsuit, I paid an attorney to defend me personally and my business, Democratic Underground. I spent approximately \$3,600 for this service.
27. In later August I got in touch with the Electronic Frontier Foundation, a non-profit legal service organization, which agreed to represent me on a *pro bono* basis. Subsequently I was also represented by the law firms of Winston & Strawn LLP and Fenwick & West LLP.
28. I understand that Righthaven now would like to dismiss its suit against me and Democratic Underground. However, because our contributors make posts to Democratic Underground and because we do not review all the posts made to the DU Website (and does not have plans to start doing that in the future), I fear that I (and Democratic Underground) could be sued again for alleged infringement, including suits for posts of which I do not even have prior knowledge.
29. In fact, other users have posted other excerpts from the *Las Vegas Review*

Journal at the DU website, potentially exposing me and Democratic Underground to risk of having to litigate this matter over and over. One example of such a post, which includes an excerpt, a link to the *LVRJ*, and a 30-comment discussion is found at www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x2658036, a true and accurate copy of which is attached as Exhibit B.

30. In at least one instance, a user removed his own post for fear of being sued and replaced an excerpt of an article from the *Las Vegas Review-Journal* with one from the *Las Vegas Sun*, a newspaper that, to my knowledge, has not sued its readers. When one DU Website reader commented that “You've linked to the site and used their subject line. I don't think that's a good idea,” and a second commented that the *Sun* had put up its story about the same topic, the original poster stated: “ I am going to replace the source now with a far better one,” and replaced the *LVRT* excerpt with a *Sun* excerpt. The discussion on the DU Website reflecting this action can be found at www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x4612768, and a true and accurate copy is attached as Exhibit C.

I declare the foregoing under penalty of perjury under the laws of the United States and that the foregoing is true and correct. Executed this 7th day of December, 2010, in Chevy Chase, Maryland.

By: 
DAVID ALLEN